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IN THE

Supreme Court of the United States

October Term, 1991

T. HARRIS YOUNG & ASSOCIATES, INC.
Petitioner,

v.

MARQUETTE ELECTRONICS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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October, 1991

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RULE 29.1 DISCLOSURE

The caption of the case in this Court contains the names of all parties to the appeal in the United States Court of Appeals for the Eleventh Circuit. The petitioner, T. Harris Young & Associates, Inc., has no parent companies, subsidiaries or affiliates. The following is a list of the parent companies, (except wholly owned subsidiaries), and affiliates of the respondent, Marquette Electronics, Inc. This representation is made pursuant to Rule 29.1 of this Court:

Marquette N. Ireland, Ltd.
Marquette Gas Analysis Corp.
Marquette Electronics GB, Ltd.
Marquette Espana S.A.
Marquette Electronics SARL
Marquette Electronics GMBH
Marquette Italia S.A.

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PETITIONER'S REPLY

SUPPLEMENTARY STATEMENT OF THE CASE

The testimony of Young's expert Dr. Rubin (R. 27-529-530) and his report (PX. 125) was substantial evidence that Marquette was dominant in the tying product market and it justified the jury's finding that Marquette "had sufficient power in the relevant market to raise prices or impose burdensome terms to a significant number of buyers within the market" (3a).[1] Marquette Division Manager Mickelson confirmed this by his testimony that Marquette sold "better than 50% of the [EKG] market in most areas of the country" (R. 13-339 at 315, 322-347-351). Marquette attacks the weight[2] of Dr. Rubin's opinion that it "occupies a dominant position in the market for

[1]References to (a) are the appendix to Young's petition for a writ of certiorari. Additions to the appendix which are included with this reply are numbered consecutively following the last numbered page of the appendix to the petition.

[2]Dr. Rubin's qualifications as an expert were stipulated (R. 27-505); his opinion and the U.S. Testing Company Market Research Report (PX. 125)

EKG, Stress testing equipment. . . " (PX. 125 at 13), and ignores its self-description as a "world leader" in electrocardiography (PX. 5, 108 and R. 18 at 52), and ignores its effort made in this case to protect against Young's alleged violation of its tradename and trademark (R. 14-10-16; PX. 110, R. 20-939). Clearly, the Eleventh Circuit did not decide the tying claim on the question of proof of Marquette's dominance in the tying product market (39a).

Appleton Paper Company manufactured the paper stock used by Marquette and Young and it considered the difference between the two papers to be subjective, "minimal" and "very slight." (R. 13-339 at 117, 120-121). Young was able to sell its generic paper to hospital customers at a price 18% less than "Marquette" paper, and nevertheless retain a 10% greater return (R. 18-141-142).

Marquette's service and supply division (including paper) showed a 50% pre tax profit as of August, 1986. Furthermore, its supply sales yielded 15-20% of overall corporate profit although they represented less than 5% of gross corporate sales (R. 20-723-24; R. 22-1333-1336).

Marquette decided to establish its own supply facility in the State of Florida (PX. 102, 103, 104), and in the words of Warren Cozzens, a co-founder and officer of Marquette, his company's supply division had decided to make an effort to "put [Young] out of business." (PX. 93, R. 20-922-929 at 927).

In an effort to implement the corporate strategy of putting Young out of business, and of increasing its sales of its own higher priced paper Marquette pursued the tying strategy in question:

(1) Marquette employees had telephone and face to face

---

were admitted into evidence (R. 27-523-525, 530); and the admission of this evidence and Dr. Rubin's qualification as an expert were not challenged by Marquette on appeal.

contact with all potential customers in the southeast,[3] and falsely advised them that non-Marquette paper would damage printheads, and (2) Marquette would presume such as being the caused of damage to customer's machines and would not render warranty and other contracted for service if the customer continued to use non-Marquette paper (R. 27-399-400; R. 13-339 at 36-38, 68-79, 293, 296, 382.

The Marquette warranty agreement provided to hospital customers stated that:

> This warranty does not cover repairs or replacement parts which ***in the opinion of Marquette***, are required as the result of . . . use of . . . supplies not recommended by Marquette (PX. 36) (emphasis supplied).[4]

Marquette senior management and service personnel knew (R. 13-339 at 174-175; R. 22-1286, 1299; and R. 13-339 at 382), and the district court agreed (22-23a) that Young's generic paper did not, in fact, cause damage to Marquette equipment and the contention that it did was conduct which was a deliberate misrepresentation.

In response to Marquette's statements, Veteran's Administration and other tax-supported hospitals decided to pay extra money to purchase Marquette paper (R. 13-339 at 36-38 and 202).

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[3]The Eleventh Circuit and Marquette have overlooked Taylor's testimony that he had heard the Marquette telemarketers tell customers that their warranty or service contracts would be "no good" if the customer used non-Marquette paper (R. 27-399) (72a). They have also overlooked substantial evidence, other than the disputed hearsay, which the district court concluded was "ample evidence" of Marquette's tortious interference (25a). Consequently, there was non-hearsay proof of Marquette's contact with all potential customers, and "ample" proof of Marquette's tortious interference with Young's business.

[4]Marquette never published specifications for paper it considered satisfactory for use in its machines (R. 18-142; R. 21-1121; R. 22-1299, 1336; R. 13-339 at 536), and never approved the use of any paper other than its own for use in its machines.

I. THE ELEVENTH CIRCUIT'S RESTRICTIVE DEFINITION OF TYING CONFLICTS WITH THE LANGUAGE AND POLICY OF THE ANTITYING STATUTE.

Contrary to Marquette's representation at pages 5-6 of its brief in opposition, the Eleventh Circuit's decision on the tying claim was not based on Young's failure to define a relevant market for the tying product.[5]

Instead, the Eleventh Circuit decided that a tying arrangement exists *only* where, as is frequently the case: (1) the seller literally conditions the "sale" (rather than fixes a price or discount) of the tying product upon the purchase of the tied product; (2) the sale is completed at a discrete point in time and is accompanied contemporaneously by "delivery" of the tying product or service sold and paid for, and (3) the defendant absolutely refuses to deliver the tying product unless the customer continues to purchase the tied product.

The Eleventh Circuit opinion, limiting the concept of "tying" to necessarily include the above requirements, is in error. First, it fails to acknowledge that the actual language of the Clayton Act not only forbids the "sale" or "lease" of a

[5]Marquette states that "the Appellate Court" held Young failed to define a relevant market for the tying product, but it cites the district court's memorandum opinion and ignores the Eleventh Circuit's disclaimer (39a).

The District Court's opinion that proof of a relevant market for the tying product was required to prove Young's *per se* claim was erroneous and was the focus of Young's appeal from the judgment n.o.v. on the tying claim. The district court properly identified the elements of proof of a *per se* tying claim, but, without explanation, reversed the jury's finding of the relevant tying market and concluded that failure to define the relevant market in equipment defeats showing Marquette's power in that market (21-22a). When a seller's market share is high as is Marquette's, or when it offers a unique product that competitors are not able to offer, the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 446 U.S. 2, 19 (1984).

tying product, conditioned on the buyer's also purchasing a "tied" product, the statute alternatively forbids a seller from "fix[ing] a price charged therefor, or discount from, or rebate upon such price" for a tying product conditioned upon the purchase of a tied product. Moreover, the opinion ignores the alternative statutory terms "understanding" and "agreement" contained in Section 3 of the Clayton Act; fails to recognize that a "sale" is not complete until delivery of the product or service sold which frequently will not occur contemporaneously with the negotiation; fails to acknowledge the lack of economic distinction between an absolute and practical withholding of the tying product based upon the creation of substantial price incentives; and fails to reflect Congressional purpose underlying Section 3.

By analogy to *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), suppose, today Northern Pacific, mindful of Supreme Court precedent, signed a contract to sell mining and timber rights, including necessary rights-of-way to its property, to customers for a specified price. Thereafter, the customers began shipping the minerals and timber by means of a less expensive trucking service rather than Northern Pacific's rail service. In response, Northern Pacific's railroad division advised customers that they would have to pay an additional price for "access" to the property unless they shipped the minerals and timber using Northern Pacific's rail service. The customers thereupon acquiesced to Northern Pacific's demand. In this scenario, no tying arrangement existed initially but rather came into existence upon "delivery" of the tying product. Moreover, Northern Pacific did not absolutely refuse to provide "access" to the property but instead threatened to impose an additional, duplicate charge for the tying product unless the customers purchased the tied product.

Under the rationale of *Northern Pacific*, and Congressional intent surrounding the enactment of Section 3 of the Clayton Act, such a *de facto* economic conditioning is equally prohibited: the defendant has used economic leverage which it posseses with respect to the desired product to practically force customers to purchase a second, less desirable product. The facts that imposi-

tion of the "conditioning" is delayed until delivery of the tying product and that the threatened withholding of the tying product is not absolute, but rather is based upon "fixing a price," do not change the character of the conduct. The economic means, motive, and effect are the same in the two cases. In the hypothetical case, just as in the actual case, customers of the tied product are forced to pay a non-competitive price for a less desirable product, and are practically prevented from purchasing product (services) offered by the defendant's competitors.

Delaying imposition of the tying arrangement until delivery of the tying product, in fact, enhances the defendant's leveraging power. If customers knew in advance, at the time the terms of the sale were negotiated, that Marquette would require them to pay 18% more for paper if they wished to actually receive warranty repair service without an additional, duplicate charge, customers might rationally shop around more for alternative, "off-brand" equipment. But once customers actually pay for the Marquette equipment, receiving also a promise to provide future repair services, they are locked into that choice. Marquette offered no evidence that repair service for its machines was available from any other source or that it competed for business in the repair market.

Moreover, there is no meaningful difference between an absolute withholding of repair service, on one hand, and the refusal to provide that service at the negotiated, and already paid price, or for any reasonable surcharge. In no tying case, after all, would the withholding of the tying product be truly absolute; everything has its price. In theory, purchasers of a desired tying product could purchase the seller outright if the seller withheld the tying product.

To place the analysis within statutory terms, Congress specifically included the terms, "fix a price" or "discount" or "rebate," as alternatives to "sell" or "lease" with respect to the tying product. That alternative element of the offense must be given meaning. In addition, Congress utilized the terms "agreement" and "understanding" as alternatives to

the term "condition," in Section 3 of the Clayton Act, thereby characterizing the "condition" element more flexibly. In other words, Marquette's threat to deliver the tying product (repair services) only on condition that the customer either (a) purchase Marquette's tied product (paper), or (b) pay an additional duplicate, non-competitive price for the tying product constitutes an implied, rather than direct, conditioning, and results in a coerced "agreement" or "understanding" (based upon Marquette's fixing of "variable" prices for the tying product) that the customer will purchase its tied product.

It is beyond serious argument in this case that there is indeed proof of Marquette's coercion and there is substantial evidence of its dominance in the tying product which Marquette did not rebut. Thus, the inquiry is whether the existence of *forcing* is probable, and if it is then ***per se*** condemnation is appropriate without extensive market analysis[6] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 15 (1984). The Eleventh Circuit's restrictive re-definition of tying is the barrier to a proven ***per se*** violation in this case wherein Marquette submitted no credible evidence of justification that would make its conduct procompetitive.[7]

---

[6]Mark P. Cohen who is counsel for Marquette in this case is counsel of record for the National Office Machine Dealers Association, et al. as Amicus Curiae in *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3833 (June 18, 1991), argues at pages 16-17 of his brief (filed September 19, 1991) in *Kodak* that the requirement for market analysis in order to survive a summary judgment "is overly burdensome and in direct conflict with this Court's opinion in *United States v. Loew's*, which provided, 'it should seldom be necessary in a tie-in sale case to embark upon a full scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of seller's percentage share in the market.'

[7]Tying arrangements such as the one Marquette has enforced are not procompetitive or competitively benign because of the proven harm to the public interest in the cost of health care resulting from foreclosure of competition. Tying, generally, remains a present and important issue, for example see *Faulkner Advertising v. Nissan Motor Corp.*, 905 F.2d 769 (4th Cir. 1990) *aff'd. en banc* 945 F.2d 694 (4th Cir. 1991) which is evidence of the importance of this Court's authoritatively defining a

Marquette's "implied" or "effective" conditioning is unlawful, as in *United States v. Loews, Inc.*, 371 U.S. 38, 45 (1962): "for two reasons — [it] may force buyers into giving up the purchase of substitutes for the tied product . . . and [it] may destroy the free access of competing suppliers of the tied product to the consuming market."

Loew's is evidence that the Court, as well as Congress, is not concerned with form but is concerned with economic reality. Both of the expressed evils of tying arrangements are demonstrated in this case, although the tying understanding is not imposed by Marquette at the time of the original negotiation, and although Marquette's conditional refusal to deliver the tying product (service and the corresponding benefit of the equipment) is not absolute.

The reality of this case is that the public is paying substantially increased prices for electrocardiographic recording paper without any good reason for doing so. Thus, it appears that the Eleventh Circuit's apparent revision of the definition of unlawful tying arrangements will sanction rising health care costs.[8]

"tying arrangement." *Faulkner* affirmed by an evenly divided court the dismissal of a complaint that automobile retailers were directly forced to purchase a tied product (advertising) in order to receive delivery of the tying product (automobiles). The auto dealers complained that they were forced to pay an increased price for automobiles to cover the cost of advertising which they could have purchased separately from another source.

[8]Anticompetitive abuses in the health care industry were said to be an area of priority concern to the United States by James F. Rill, Assistant Attorney General, Antitrust Division, United States Department of Justice in a speech to the Antitrust Committee of the Litigation Section of the American Bar Association, Antitrust Litigator, ABA Section of Litigation, Newsletter No. 15, September, 1991.

II. THERE WAS AMPLE "NON HEARSAY" EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT MARQUETTE TORTIOUSLY INTERFERED WITH YOUNG'S BUSINESS.

Marquette does not account for Taylor's (Marquette's former printing plant supervisor) entire testimony (72-73a), or that of Calenberg a Marquette telemarketer whose testimony was not excluded as hearsay. These two Marquette employees confirmed its strategy regarding Young.

Marquette also fails to acknowledge the district court's opinion on its decision denying a judgment n.o.v. on the tortious interference claim which identified specific additional tortious conduct by Marquette beyond fraudulent representations (25a). The Eleventh Circuit purported to conclude, without accurately describing the "reams of evidence" (51a), that there was insufficient evidence to support a rational jury verdict but it was apparently unable to fully and accurately consider the lengthy record.

This Court should rule that except in the most elementary of cases having uncomplicated records that Federal appellate courts should not exclude from review record evidence without allowing the district court to evaluate the newly reduced record to determine the necessity for a new trial in consideration of the improper admission of evidence. The trial judge's primary role in reviewing the adequeacy of an entire record to support a verdict avoids the perception of a result-oriented bias naturally following an abstract evaluation of less than the entire record.

Marquette is mistaken in its representation of the proceedings on the judgment initially in Young's favor for tortious inference with business. Marquette's alternative motion for a new trial of Young's tortious interference claim was denied (24-28a), and it appealed from the judgment in Young's favor. The Eleventh Circuit's decision granting Marquette a JNOV

on this claim on admissibility of evidence grounds was the first cause for Young to have raised the point that a motion for a judgment n.o.v. tests only the sufficiency of the evidence not its admissibility. Young asked in a supplement to its petition for rehearing on the tortious interference claim that a new trial be ordered on that claim (55a).[9] The Clerk of the Eleventh Circuit accepted Young's supplementary request which the court ultimately denied (ra12).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9]Marquette has erroneously stated at pages 6 and 8 of its brief in opposition that Young does not challenge the Eleventh Circuit's hearsay rulings. See footnote 8 at page 16 of Young's petition for a writ of certiorari.

APPENDIX

Respondents were asked, "What is your primary brand of EKG equipment?" Table 1 reveals that most respondents either use Marquette (48%) or Hewlett Packard (39%) EKG equipment.

Table 1
Response to Question #1
"What is your primary brand of EKG equipment?"

Brand	Frequency	Frequency %
Marquette	125	48%
Hewlett Packard	100	39%
Burdick	18	7%
Cambridge	8	3%
Others	7	3%
None	1	.3%
	259	100%

Table 1a takes into consideration the category "Undercount." It indicates that the Marquette category decreased by 1 percent from the original data tabulation. This indicates that the distribution is not appreciably affected by the undercount.

Table 1a

Response to Question #1 with Undercount Category
"What is your primary brand of EKG equipment?"

Brand	Frequency	Frequency %
Marquette	125	47%
Hewlett Packard	100	37%
Burdick	18	7%
Cambridge	8	3%
Others	7	3%
None	1	.3%
Undercount	9	3%
	268	100%

Question 2

Question 2 asked resondents, "What is your primary brand of stress testing equipment?" Table 2 reveals that Marquette has the largest share of the market with 43%. Quinton has the second largest share with a distant 27% of the market.

Table 2

Response to Question #2

"What is your primary brand of stress testing equipment?"

Brand	Frequency	Frequency %
Marquette	111	43%
Quinton	69	27%
Hewlett Packard	90	3%
Burdick	7	3%
Cambridge	5	2%
IMC Seamans	4	1%
Copy Stress	4	1%
None/Dk	39	15%
Others	11	4%
	259	100%

Table 2a takes into consideration the category "Undercount." It indicates that the Marquette category decreased by 2 percent from the original data tabulation. This indicates that the distribution is not appreciably affected by the undercount.

Table 2a

Response to Question #2 with Undercount Category
"What is your primary brand of stress testing equipment?"

Brand	Frequency	Frequency %
Marquette	111	41%
Quinton	69	26%
Hewlett Packard	9	3%
Burdick	7	3%
Cambridge	5	2%
IMC Seamans	4	1%
Copy Stress	4	1%
None/Dk	39	15%
Others	11	4%
Undercount	9	3%
	268	100%

Question 1 and Question 2 Combined

Table 4 indicates that 63% of the respondents have some form of Marquette equipment. That is, 31% have only Marquette EKG equipment, 23% have only Marquette stress testing equipment, and 46% have both EKG and stress testing equipment manufactured by Marquette. Whereas 42% of the respondents have some form of Hewlett Packard equipment.

Table 4

Question #1 and #2 Combined

EKG Equipment	Freq	%	EKG Only Freq	%	Stress Test Only Freq	%	Both Freq	%
Analyzed Responses	259							
Marquette	162	63%	51	31%	37	23%	74	46%
Hewlett Packard	105	42%	96	91%	5	5%	4	4%
Burdick	24	9%	17	71%	6	25%	1	4%
Cambridge	12	5%	7	58%	4	33%	1	8%

These numbers and percentages reflect multiple responses.

DAVID TAYLOR TESTIMONY
(R.27-398-400)

*****

Q Would you tell us what you did with Terry Johnson doing your work?

A When Terry Johnson came in, he came from the outside and he confided in me. I was one of the few people that he confided in. I think still today he doesn't have anybody that he confides in, but he confided in me. He thought I was his best friend, I would say.

Q Did you work with Terry at the end of 1986?

A Right, directly I was with Terry. I worked under Terry for the last year.

Q And, did you work with Terry in 1987 before you left?

A Right.

Q Did you have any discussions with Terry about a man named Harris Young or a company named T. Harris Young and Associates?

A Yes, we had a lot of conversations.

Q Would you please tell me about those conversations?

A Well, everything that he confided in me about the relationship, he brought in four telemarketers. We never had telemarketers. Terry Johnson brought in four telemarketers and we just took sales direct for all the years that I was there. And, the four telemarketers started working the country and he worked the south, they worked the southeast here real hard against Harris to try to take over the southeast. And, with that, they were doing their sales pitch of the telemarketers which was putting on if you continued to buy Harris Young's paper, your warranty would be no good and also your service contract would be no good.

Q Did you have any discussion with Terry Johnson about that?

A He confided in me. He told me all about it and I stood out there and listened to the telemarketers.

Q What did you listen to and what did you hear?

A Tim, that was the head telemarketer, in the first three months that he put the telemarketers on, we had a million dollar party. The telemarketers sold one million dollars in the first three months that they had put those on.

Q Did Terry Johnson tell you that he instructed the telemarketers about anything, about to say anything in particular about Mr. Young or his company?

A Well, just if you used other paper than Marquette's paper, that your service contract was no good and also your warranty on your machines.

Q Did you have any discussions with Terry where Harris Young or his company was specifically mentioned by Terry?

A Yes, we talked about it. It was a big laughing joke at the time. They pulled in one million dollars in three months so it was a —

Q All right; and, for how long did this go on?

A Until I left, it was still going on. I left in 1987, July 1 of 1987. It was still going on when I left.

CHARLES BRINKLEY TESTIMONY
(R.13-339-36-38)
******

Q. Have you, during 1988, had the experience of having Marquette representatives visit your facility, your hospital facility or your department facility?

A. During '88?

Q. Yes.

A. Yes.

Q Have you had the occasion personally to speak with any representatives of Marquette while they were at the hospital facility?

A. Yes.

Q. And during those occasions have you had the experience of having Marquette representatives make statements to you concerning what kind of recording paper that should be used in the Marquette equipment?

A. I think most of tihs went on before 1988, and actually, its been sort of an ongoing thing from the time that I was at Marquette and my conversations that I've had with my supervisor and so forth, and conversations that he's had with people at Marquette.

Q. Would you start with your experience at Marquette and then take us forward and relate for me, please, what experience you had in conversations with Marquette folks about recording paper.

A. There were questions, you know — like you said, there were several people there from different hospitals being trained, and there were questions about using different type paper in the Marquette recorders. And we were told that, you know, it might be possible to use a lot of different types of paper in it and that they might be okay, but that they had had ex-

perience with some types of papers that had too rough a surface and which did cause scratches on the print head which caused early failure of the print head, and that if that happened, that they wouldn't be covered under a service warranty or I believe under a service agreement. I really wasn't too interested in the service agreement because we don't have one or probably won't. But I'm sure they said that it wouldn't be covered under warranty if it was found that a paper had been used which was not suitable for the thermal print head and that it had been damaged because of the paper we used.

Q. Let's stop for a minute and permit me to interrupt by asking a question concerning statements of that regard made at the training session. Was Graphics Control paper specifically identified in that session as one that had been found unsuitable?

A. I don't believe so. They may have mentioned a specific type paper, but I don't remember if they did.

Q. Pardon the interruption. If you would then continue and tell me when is the next time that you had the occasion to have a statement made in your presence or to your supervisor that you know of concerning this subject.

A. Well, we had just discussed it, and I didn't know we would be doing all this so I wasn't keeping notes or keeping dates or anything. But I know he had talked with some of the folks at Marquette and had gotten the same impression that I had, that there might be some problem with warranty if a paper was used that was found to be damaging the heads, and we discussed it, and we came to the conclusion that it would just be better for us to use Marquette paper during the warranty period so there wouldn't be a problem with that, and then when the warranty period was over, we could try other papers and see if they seemed to work okay if there were other papers available that were cheaper than the Marquette paper.

Q. Is the cost of health care delivery a concern to your hospital?

A. Sure.

Q. Why?

A. Because, you know, it's a big problem trying to keep costs down. We always try to operate as economically as possible for that reason.

*****